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No. 95

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

HARLEY-DAVIDSON, INC.,

Petitioner,

v.

MINSTAR, INC., and AMF INCORPORATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the
United States Court of Appeals
For the Seventh Circuit

No. 94-2171

HARLEY-DAVIDSON, INCORPORATED,

Plaintiff-Appellee,

v.

MINSTAR, INCORPORATED, and AMF INCORPORATED,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 90 C 1245—**Rudolph T. Randa**, *Judge.*

ARGUED OCTOBER 24, 1994—DECIDED NOVEMBER 30, 1994

Before POSNER, *Chief Judge*, BAUER, *Circuit Judge*, and WILL, *District Judge.**

POSNER, *Chief Judge.* Harley-Davidson, the plaintiff in this CERCLA suit (the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, commonly known as the Superfund statute), owns a manufacturing plant in York, Pennsylvania. Its predecessor had bought the plant from a predecessor of Minstar, Inc. and AMF Inc., related corporations that are the defendants-appellants. The buyer had agreed to indemnify the seller against all liabilities relating to the

* Hon. Hubert L. Will of the Northern District of Illinois.

division of the seller (called the AMF York Division) that owned the plant. Later the land on which the plant was located was found to be contaminated and Harley-Davidson was forced to incur clean-up costs. CERCLA entitles the owner of contaminated land to seek contribution from other persons who are responsible in whole or part for the contamination, so Harley-Davidson brought this suit against Minstar, AMF, and others. Minstar and AMF set up the indemnity agreement in defense, but the district judge ruled that the agreement was invalid under CERCLA and therefore was not a defense to Harley-Davidson's claim for contribution. 837 F. Supp. 978 (E.D. Wis. 1993). Although this was an interlocutory ruling, the district judge certified it for an immediate appeal under 28 U.S.C. § 1292(b), and we accepted the certification.

Section 107(e) of CERCLA states, in subsection (1): "No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from . . . any person who may be liable . . . under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section." 42 U.S.C. § 9607(e). Harley-Davidson directs our attention to the first sentence, which appears to invalidate indemnification agreements made by "responsible parties" (in the lingo of CERCLA), such as Minstar and AMF, while Minstar and AMF direct us to the second sentence, which appears to authorize precisely such agreements. The subsection taken as a whole is notably obscure, but we agree with every other appellate court that has been called on to interpret it that it does not outlaw indemnification agreements, but merely precludes efforts to divest a responsible party of his liability. E.g., *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993); *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993). The first sentence speaks of "transfer[ring] . . . liability," that is, of shifting liability from one person to another. Indemnification does not do that. The indemnified

party remains fully liable to whomever he has wronged; he just has someone to share the expense with. The second sentence clearly permits sharing, just as the first forbids shifting.

It would be extraordinary if the draftsmen had wanted to bar insurance against CERCLA liability (insurance is just a form of indemnification). Public policy does on occasion demand that a wrongdoer be forbidden to shift the cost of liability to another through insurance or some other form of indemnification, but that is in cases of deliberate wrongdoing. *Truck Ins. Exchange v. Ashland Oil, Inc.*, 951 F.2d 787, 790 (7th Cir. 1992); *Western Casualty & Surety Co. v. Western World Ins. Co.*, 769 F.2d 381, 385 (7th Cir. 1985). Individuals and firms are normally allowed to insure against the consequences of their negligence; what else is automobile liability insurance? Proof of CERCLA liability does not require proof even of negligence, let alone of deliberate wrongdoing; CERCLA liability is strict. *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775, 779 (7th Cir. 1992); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); see *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325-26 (7th Cir. 1994). Harley-Davidson flinches from the implications of its position, and, fastening on the word "insure" in the subsection's second sentence (it does not appear in the first sentence), argues that contracts of insurance are the one and only form of indemnification that the statute allows. But what sense would that make? Why would rational draftsmen allow a polluter to shift the cost of his liability to an insurance company but not to another polluter? Even the semantic argument is weak, since "insure" does not stand alone; the words are "to insure, hold harmless, *or indemnify*." Harley-Davidson wants us to strike words from the statute, and it had better have compelling reasons for such disfiguring surgery.

It points out that if indemnification (we would add, in the form of insurance as otherwise) is allowed, potential polluters will have less incentive to take steps to avoid

CERCLA liability, since they will be able to hand off all or part of the cost to the indemnitor. That of course is a problem with any form of insurance or indemnification. It is what is called moral hazard. When the problem is especially acute, insurance companies will not write insurance. *Western Casualty & Surety Co. v. Western World Ins. Co., supra,* 769 F.2d at 385. The law may even, as we noted, bar indemnification, as in cases of deliberate wrongdoing. The venerable requirement that an insured have an "insurable interest," the requirement that for example prevents a person from buying life insurance on the life of a stranger, *Connecticut Mutual Life Ins. Co. v. Schaefer,* 94 U.S. 457, 460 (1877), illustrates the concern with moral hazard. One can imagine, if barely, a decision by Congress that pollution is such an awful menace to society that polluters—even involuntary polluters—should be forbidden to insure. But there is no evidence of such a decision and it would be inconsistent with the second sentence, as well as with Harley-Davidson's concession that Minstar and AMF could have protected themselves with an insurance contract.

That leaves the first sentence unexplained. And it is mysterious. Indemnification does not, as we have already explained, "transfer" liability from the person indemnified. The latter remains fully liable to the victims of his wrongdoing. If a person buys automobile liability insurance and later is sued for damages arising out of an automobile accident, he cannot defend by saying, "I have insurance, so am not liable to you; go sue the insurance company." In most states the victim could not sue the insurance company if he wanted to. *National Union Fire Ins. Co. v. Baker & McKenzie,* 997 F.2d 305, 308 (7th Cir. 1993); *Truck Ins. Exchange v. Ashland Oil, Inc., supra,* 951 F.2d at 789. But in the legislative process leading up to the enactment of CERCLA, Congress considered allowing defendants in some cases to transfer liability to other responsible parties. S. Rep. No. 848, 96th Cong., 2d Sess. 44 (1980); Thaddeus Bereday, Note, "Contractual Transfers of Liability under CERCLA Section 107(e)(1): For Enforcement of

Private Risk Allocations in Real Property Transactions," 43 *Case W. Reserve L. Rev.* 161, 178-79, 204-07 (1992). The idea was dropped, and the first sentence of section 107(e)(1) may have been intended to make clear beyond any possibility of doubt that it was indeed dropped, that there is no transferring CERCLA liability. This is conjecture, but it is more plausible conjecture than anything that Harley-Davidson has offered us.

It has urged on us, however, an alternative ground for upholding the district judge's ruling barring Minstar and AMF from enforcing the indemnification agreement: that despite the breadth of the agreement, it is not in fact applicable to the clean-up costs that Harley-Davidson incurred at the York, Pennsylvania site. This ground was not considered by the district court, but that is no bar to our considering it. Any nonwaived ground may be urged on appeal in defense of a judgment. *Massachusetts Mutual Life Ins. Co. v. Ludwig*, 426 U.S. 479 (1976) (per curiam). This precept is as applicable to orders of which we have jurisdiction by virtue of 28 U.S.C. § 1292(b) as it is to any other orders. *Edwardsville National Bank v. Marion Laboratories, Inc.*, 808 F.2d 648, 651 (7th Cir. 1987); cf. *Miller v. Bolger*, 802 F.2d 660, 666-67 (3d Cir. 1986). Normally, it is true, we review only final judgments (final "decisions" in the language of 28 U.S.C. § 1291). But if an interlocutory order is properly before us, the reason for considering alternative grounds for affirmance of a final judgment is equally present. It is pointless to reverse the district court if it is apparent that when the case is remanded, that court will have to reinstate its order because the party that obtained it in the first round is indeed entitled to it, albeit on a different ground from the one initially adopted by that court.

The question that Harley-Davidson asks us to answer regarding the scope of the indemnification agreement depends simply on the wording of the agreement interpreted in light of applicable state law governing indemnification agreements; there is no question of federal law. E.g., *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 212-15 (3d

Cir. 1994); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 14-15 (2d Cir. 1993); *American Policyholders Ins. Co. v. Nyacol Products, Inc.*, 989 F.2d 1256, 1263-64 (1st Cir. 1993). Harley-Davidson argues that the agreement is not broad enough to cover the contamination of the York site. But it could not be more broadly worded. It says that "[Harley-Davidson] shall . . . indemnify AMF INCORPORATED against all debts, liabilities, and obligations, without any limitation, relating to AMF INCORPORATED's AMF York Division, its operations and products, whether known or unknown, . . . and whether existing on the date of this agreement or coming into existence hereafter." The arguments that Harley-Davidson makes against taking the words in their natural meaning are makeweights, illustrated by its argument that other divisions of the defendants' predecessor may have been responsible for the contamination—the York Division merely owned the site, and the agreement refers to York's "operations and products." Yes, but the operative wording is "relating to . . . [the] York Division, its operations and products," and liability arising from the contamination of land owned by the York Division "relat[es]" to the York Division. The applicability of the agreement is supported by decisions construing similar agreements in other CERCLA cases. *Olin Corp. v. Consolidated Aluminum Corp.*, *supra*, 5 F.3d at 15-16; *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1461-63 (9th Cir. 1986).

The indemnification agreement is enforceable and applicable, and bars Harley-Davidson's claim against these defendants.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—11-30-94

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 6, 1995

Before

Hon. RICHARD A. POSNER, *Chief Judge*

HARLEY-DAVIDSON, INCORPORATED, Plaintiff-Appellee,	]	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 94-2171 v.	]	
MINSTAR, INCORPORATED, a Delaware corporation and AMF INCORPORATED, a New Jersey corporation, Defendants-Appellants	]	No. 90 C 1245
	]	Rudolph T. Randa, Judge.

Upon consideration of the **"MOTION FOR STAY OF MANDATE"** filed 1/3/95, by counsel for the appellee,

IT IS ORDERED that the motion is GRANTED and the mandate is STAYED to the including 2/5/95 to allow appellee to file a Petition for a Writ of Certiorari with the U.S. Supreme Court.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

December 28, 1994

Before

Hon. Richard A. Posner, Chief Judge

Hon. William J. Bauer, Circuit Judge

Hon. Hubert L. Will, District Judge *

HARLEY-DAVIDSON, INCORPORATED, *Plaintiff-Appellee,*	}	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 94-2171 v.	}	No. 90 C 1245 Rudolph T. Randa, *Judge.*
MINSTAR, INCORPORATED, and AMF INCORPORATED, *Defendants-Appellants.*	}	

ORDER

On December 14, 1994, plaintiff-appellee filed a petition for rehearing with a suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges** has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

* Hon. Hubert L. Will, of the Northern District of Illinois, sitting by designation.

** Hon. Walter J. Cummings did not participate in the consideration of the petition for rehearing en banc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HARLEY-DAVIDSON, INC.,

Plaintiff,

vs. Case No. 90-C-1245

MINSTAR, INC.
AMF INCORPORATED,
the UNITED STATES OF
AMERICA,
the UNITED STATES
DEPARTMENT OF
DEFENSE and the UNITED
STATES
DEPARTMENT OF THE NAVY,

Defendant.

DECISION AND ORDER

This case involves a dispute between Plaintiff, Harley-Davidson, Inc., ("Harley-Davidson"), and Defendants Minstar, Inc., ("Minstar"), AMF, Inc., ("AMF"), U.S.A., U.S. Department of Defense, and the U.S. Department of the Navy (collectively, "the Navy"), over liability for clean-up of a contaminated industrial site. The dispute centers on

two agreements[1] and a settlement in State Court arising from one of the agreements. Minstar and AMF assert that the Agreements effectively transferred liability and, hence, the cost of clean-up from Minstar and AMF to Harley-Davidson. Harley-Davidson acknowledges the Agreements, disputes their meaning, and argues that the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) negates Minstar-AMF's contractual transfer of liability. Harley-Davidson seeks recovery of its response costs under CERCLA, and a declaration of the liability of all parties under CERCLA and the two Agreements.

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[1]The two agreements are a 1980 Acquisition Agreement ("1980 Agreement") whereby AMF transferred all the assets and liabilities of its York Operation to AMF-York and a 1981 Purchase Agreement ("1981 Agreement") under which AMF sold its stock in AMF-York and related assets to Harley-Davidson.

Minstar and AMF move the Court for judgment on the pleadings which, pursuant to a subsequent Order of Judge J.P. Stadtmueller, was transformed into a Motion for Summary Judgment.[2]

FACTS

The genealogy for this industrial site is rather short, considering that it has been used as such since 1944. In 1944 the Navy took title to the industrial site in question now known as the York Facility. From 1944 to 1964, the Facility was operated as the York Naval Ordinance Plant. The United States sold the facility to AMF on

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[2]This case was originally assigned to Judge J.P. Stadtmueller but later transferred to this Court. After hearing oral argument on the motion for judgment on the pleadings, Judge Stadtmueller asked for supplementation of the record which resulted in the motions as they currently stand before the Court. Whether labeled a Motion for Judgment on the Pleadings or Motion for Summary Judgment is of no consequence as will be made clear from the ruling.

January 31st, 1964. In 1980, AMF transferred the York Facility by a Quitclaim Deed to a wholly owned subsidiary, AMF York, Incorporated ("AMF York"). Paragraph three of the 1980 Agreement provided that AMF York "shall assume and discharge and shall indemnify AMF Incorporated against all debts, liabilities and obligations without limitation relating to AMF Incorporated's AMF York Division, its operations and products, whether known or unknown". On June 16, 1981, AMF transferred the Facility to Harley-Davidson. Minstar acquired AMF in 1985.

All three owners of the Facility, the Navy, AMF, and Harley-Davidson have performed manufacturing operations there. In 1986, Harley-Davidson conducted an environmental audit at the Facility and discovered environmental contamination. Since 1986,

Harley-Davidson has responded to the contamination under the supervision of the Pennsylvania Department of Environmental Resources. Harley-Davidson alleges that the contamination at the Facility is attributable to the activities of the prior owners, operators and successors in interest (the Navy, AMF and Minstar).

Harley-Davidson filed this action pursuant to CERCLA Sections 107 and 113, 42 U.S.C. § 9607, 9613, naming the Navy, AMF, and Minstar as defendants. As previously indicated, Harley-Davidson seeks recovery of its response costs and a declaration of liability. An Amended Complaint was filed by Harley-Davidson containing an additional count against Minstar and AMF based on the Pennsylvania Hazardous Sites Clean-up Act. ("PAHSCA")[3]

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[3]PAHSCA parallels CERCLA in general and, as argued by Minstar and AMF, is "virtually identical" to Sec. 107(e) of

While alleging that Harley-Davidson was responsible for the contaminated site, AMF and Minstar also alleged that they had discharged all of their obligations to Harley-Davidson for environmental contamination at the York Facility pursuant to the 1980 and 1981 Purchase Agreements.

Under the 1981 Agreement, AMF agreed to "retain and be responsible for the liabilities and obligations in respect of the related assets against and in respect of which AMF is idemnifying (Harley-Davidson) pursuant to Sec. 10.5(a)." 1981 Agreement, Sec. 2.2. The liabilities and obligations for which Harley-Davidson was indemnified included any loss, liability, or obligation in connection with AMF's liabilities "arising out of or resulting from an

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CERCLA. Interpretation of Sec. 107(e) of CERCLA is central to this decision.

event or an occurrence . . . due to non-compliance with any Federal, State, or local law, regulation, order or administrative or judicial determination relating to the environment . . ." prior to transfer of the property to Harley-Davidson. 1981 Agreement Sec. 10.5(a)(1). These Agreements were the subject of the aforementioned State action brought by Harley-Davidson in Wisconsin State Court. Harley-Davidson, Inc., v. Minstar, Inc., No. 90-CV-004063 (Milwaukee Circuit Court, Wisconsin, filed March 23, 1990), which has subsequently been settled.[4]

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[4]Pursuant to this Settlement, Minstar agreed to pay $1,900,000 towards the investigation and clean-up work at the York Plant by April 15, 1991, and also agreed to pay the lesser of 60% of project costs or $125,000 for each successive calendar quarter (Settlement Agreement, ¶ 1-3). Minstar agreed to continue such payments until a total of all project costs paid by Minstar under the Agreement equals the lesser of $4,000,000 or 60% of final project costs. (¶ 4). The parties stipulated that the

The 1980 and 1981 Agreements and the settlement of the State Court litigation are the basis for AMF's and Minstar's present motion. AMF and Minstar contend that the Agreements comprise Harley-Davidson's exclusive remedy against them for pre-acquisition environmental problems and that the settlement of the State Court action precludes Harley-Davidson's CERCLA action. In other words, AMF and Minstar

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payments under the Settlement Agreement would satisfy all the relevant indemnity obligations of AMF and Minstar under the 1981 Purchase Agreement (¶ 5-7). The parties agreed to dismiss with prejudice all claims in the State Court action. The parties also agreed that Minstar's and AMF's potential liabilities under CERCLA, if any, which were the only claims then pending in the Federal Court case would be resolved separate from the Settlement Agreement. The Settlement Agreement provides that payments thereunder are a credit against any CERCLA liability. From the outset, AMF and Minstar have taken the position that Harley-Davidson's CERCLA claims are precluded by the 1980 and 1981 Agreements.

argue that they have, as recognized potentially responsible parties under CERCLA, successfully transferred and satisfied the liability they may owe under CERCLA to Harley-Davidson, another potentially responsible party.

ANALYSIS

Because the Court interprets Sec. 107(e) of CERCLA to preclude the contractual transfer of liability between parties responsible or potentially responsible for the clean-up of contaminated sites, Minstar and AMF cannot rely on the 1980 and 1981 Agreements or the State Court settlement arising therefrom to avoid any further liability it may have under the Statute.[5]

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[5]Depending on the total response costs, Minstar and AMF's current and obligated contributions may satisfy the liability that is ultimately attributed to them.

The conclusion that this Court reaches is considered the "minority" view. However, the Court accepts this view for the following reasons:

Although the stated purpose of CERCLA is clear some of its sections, in particular Sec. 107(e)(1), have been, judging from the amount of differing opinions, elusive in their meaning. The meaning of Sec. 107(e)(1) becomes readily clear, however, through an application of the language of the statute itself and the proper canons of statutory construction. Since the meaning of Sec. 107(e)(1) is discernible from these sources and is consistent with the objective of the law, there is no need to delve into its legislative history.[6] The

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[6]While the legislative history seems to support this Court's conclusion, it is ambiguous. "[N]ot the least of the defects of legislative history is its indeterminacy". Conroy v. Aniskoff, 113 S. Ct. 1562, 1567 (1993). Indeed, if we

primary guide for interpreting Sec. 107(e)(1), therefore, must be the language of Sec. 107(e)(1). "The law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself . . ." Conroy, 113 S. Ct. at 1567, quoting Aldridge v. Williams, 3 Howard 9, 24 (1844).

With this in mind, we look at the language of CERCLA. Under Sec. 107(a) there are four categories of potentially responsible parties. The current owner and operator of a contaminated site, the owner or operator of that site when contamination occurred, the generators of the waste sent to the

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follow the direction of Justice Scalia in the concurring opinion in Conroy, we should not consider legislative history at all. "The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators." Id.

contaminated site, and the transporters of the waste sent to the contaminated site.[7]

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[7]Sec. 107(a) of CERCLA reads as follows: "Liability. (A) Covered Persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -- (1) the owner and operator of vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -- (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other

Sec. 107 (e)(1) states:

Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for release or threat of release under this section to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.[8]

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person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title." 42 U.S.C.A. § 9607(a) (Supp. 1993).

[8]Subsection (2) of Section 107 goes on to state: "Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a

42 U.S.C.A. § 9607(e)(1).

Taking up the first sentence of 107(e)(1), it is clear that the language proscribes any transfer "to any other person the liability imposed under this section".[9] This all-inclusive language precludes, unless clarified elsewhere, not only the transfer of "the liability imposed under this section" between potentially responsible parties, but the transfer between a potentially responsible party and a party not liable under the law.[10] Therefore, regardless of

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guarantor, has or would have, by reason of subrogation or otherwise against any person." 42 U.S.C.A. § 9607(e)(2).

[9]The first sentence of Sec. 107(e)(1) contains the wording "liability imposed under this section". The second sentence of 107(e)(1) contains the wording "liability under this section." They obviously have the same meaning and may be interchanged.

[10]As the Court in Jones-Hamilton Company v. Kop-Coat, Inc., 750 F.Supp. 1022, 1025 (N.D.Cal. 1990) stated, "the first sentence of Sec. 107(e)(1) appears to prohibit indemnification agreements

the nature of the liability imposed under this section, the transfer of that liability to "any other person" is proscribed. Courts considering only the first sentence are universal in their opinion that no other meaning could be drawn from this language. Standing alone, the first sentence is clear and unambiguous and draconian in its approach.

In turn, the second sentence of Sec. 107(e)(1), which by definition should be a qualifier of the lead first sentence[11] and therefore either explain or

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under all circumstances . . ." The Jones court went on to state, ". . . the second sentence of Sec. 107(e)(1) appears to permit indemnification under all circumstances". This is taken up infra.

[11]Due to its position and language, the second sentence should be deemed a qualification of the first. It begins with the words "Nothing in this section . . .", suggesting its use as a qualifying sentence and not as a lead or primary sentence. Indeed, to give the second sentence independence from the first sentence, and thus primacy of

modify the first sentence, appears at first glance to contradict it. The second sentence of 107(e)(1) states:

> Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

42 U.S.C.A. § 9607(e)(1).

Some Courts have dealt with this apparent contradiction by reading the second sentence of 107(e) as a primary sentence, thereby permitting the transfer of liability between all parties and not just between potentially responsible parties. Reading the language of the second sentence in this manner permits the transfer of liability in all cases but it also, as a matter of

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meaning over the first sentence, goes against basic principles of composition, logic and statutory construction. See e.g., In re Etchin, 128 B.R. 662 (Bankr. W.D. Wis. 1991) ("a qualifying phrase must be applied to the words or phrases immediately preceding it").

course, negates the first sentence completely. In this it flies in the face of basic statutory and grammatical construction. Indeed, other Courts have dealt with this negation by simply ignoring the language of the first sentence altogether. See e.g., Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31 (7th Cir. 1987); Versatile Metals, Inc. v. Union Corporation, 693 F. Supp. 1563 (E.D. Pa. 1988); FMC Corporation v. Northern Pump Company, 668 F. Supp. 1285 (D.Minn. 1987); Mardan Corporation v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986)(where Court assumed the right to contractually transfer liability between potentially responsible parties); Rodenbeck v. Marathon Petroleum Co., 742 F.Supp. 1448 (N.D.Ind. 1990)(where the provisions in question were essentially ignored).

The second sentence of Sec. 107(e)(1) cannot be read as other than a qualifier of the first sentence because statutory sections must be read to establish consistency with each other. Statutes should not be interpreted so as to render one part inoperative, superfluous, or insignificant. In re Gasteiger, 471 F. Supp. 13, 15 (E.D. Tenn. 1977). To give the second sentence independent meaning and/or to ignore the first sentence is to make the first sentence, which is an all inclusive lead sentence, truly "inoperative, superfluous and insignificant". Id. If inconsistency can be avoided or consistency achieved by one manner of reading the language of the statute, it should be done. All parts of the statute should be given affect. Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961).

Other Courts, in an attempt to reconcile the two sentences and observe the foregoing basic standards of statutory construction, have properly recognized the second sentence as a qualifier or modifier of the first. They have "squared" the language of the second sentence with that of the first by positing that the "liability imposed under this section" language contained in the first sentence of 107(e)(1) is a liability imposed by, and owed to, the U.S. Government. Thus, it is reasoned, as long as the liability owed to the Government is in no way diminished, the second sentence of this Section allows the transfer of the <u>costs of that liability</u> to another potentially responsible party. This interpretation, the reasoning continues, preserves the internal logic of the subsection, observes proper principles of statutory

construction, and maintains the objective of the statute. For instance, the Court in Niecko v. Emro Marketing Company, 973 F.2d. 1296 (6th Cir. 1992) relied heavily on legislative history and held:

> [T]he first sentence insures the clean-up is performed and those responsible cannot escape their liability for cleaning the property. However, in terms of financial liability, the parties may allocate the costs of the clean-up between them . . . [T]his is a more palatable and consistent interpretation . . . because it allows the two sentences to be read as internally consistent.

Id., at 1301 (Emphasis supplied.)

In addition, the 6th Circuit in AM International, Inc. v. International Forging Equipment Corporation, 982 F.2d 989 (6th Cir. 1993), again relying on legislative history,[12] specifically

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[12]For an example of the opposite conclusion suggested by Niecko's reading of legislative history, see 126 Cong.Rec. 30, 984 (1980) and an exchange between Senators Cannon and Randolph (a sponsor of the bill), wherein it was their

overturned the District Court which adopted the conclusions reached here. The Court stated that its reading of the statutory language, proposed first in Niecko,

> "seems to us to make sense both in logic and as a matter of public policy.[13] The

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understanding that contractual transfer of liability between potentially responsible parties was precluded. Indeed, this is apparently the only legislative history that discusses the seeming contradiction of the sentences.

[13]The Court would note that effective public policy arguments can be made for both positions. See, for example, the District Court opinion in AM International, 743 F. Supp. 525 (N.D.Oh. 1990). The AM International Court determined that its interpretation of Sec. 107(e) was consistent with the policy of galvanizing potentially responsible parties to rapidly clean up contaminated sites. In addition, see commentaries such as 75 Minn. L. Rev. 1571, wherein it is argued, among other things, that "national uniformity" is achieved by the District Court's position. On the other hand, see 43 Case Western Reserve L. Rev. 161, arguing that private risk allocation should be and would be encouraged by allowing the transfer of liability between potentially responsible parties.

> underlying purposes of the statutory language under scrutiny is to ensure that responsible parties will pay for the clean-up and that they may not avoid liability to the government by transferring this liability to another. However, this purpose is not inconsistent with parties responsible for the clean-up transferring or allocating among themselves the costs associated with this liability so long as they remain liable to the third party who can demand the clean-up. This is what is permitted by the second sentence--the shifting or allocation of the risk of the cost of liability between potentially responsible persons without diluting CERCLA liability for the clean-up itself.

Id. at 994. (Emphasis supplied.)

Although correctly recognizing the second sentence as necessarily a qualifying sentence,[14] the foregoing analysis misinterprets the meaning given by the statute itself to the language

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[14]As was stated in AM International, "the second sentence (of Sec. 107(e)(1)) provides an exemption which narrows the scope of the first". Am International, 982 F.2d at 995.

"liability under this section". Section 107(a) defines that liability and clearly states that a potentially responsible party shall be liable for:

> (A) all costs of removal or remedial action incurred by the United States Government . . .;
> (B) any other necessary costs of response incurred by any other person. . . .

42 U.S.C.A. § 9607(a)(4)(A)&(B) (Supp. 1993). Thus, the very distinction cases like Niecko and AM International seek to draw between the liability owed to the Government and the liability owed to other responsible parties cannot be drawn because both are "liabilit[ies] imposed under this section" that cannot be transferred. The Niecko and AM International Courts, in seeking to transfer the "risk, of the cost of liability" or the "costs associated with this liability" (AM International) or the "financial liability" or "costs of the

clean-up" (Niecko) between potentially responsible parties, are really seeking to transfer the "response costs incurred by any other person", which is proscribed by Sec. 107(e)(1) an Sec. 107(a).

Thus, under a plain reading of the statute, the liability which cannot be transferred by a potentially responsible party under the first sentence of Sec. 107(e)(1) is a duty to contribute to the costs "incurred by the United States Government" or the "costs of response incurred by any other person". The phrase "liability imposed under this section" does not make a distinction between "financial liability" or the "costs of liability" and another liability owed to the Government. The liability owed is the cost that the Government or another party incurs in the way of response and other costs. Therefore, the "liability imposed under

this section", and that which cannot be contracted away to another potentially responsible party, are the very costs (incurred by the Government or any other person) that the majority view deems separate from a liability owed to the Government. The statute is clear as to what the non-transferable liability is, and the language of the statute defining liability precludes the alternative suggested by the majority view.

Because the main thrust of Sec. 107(e)(1) is primarily to prevent the transfer of costs that a potential responsible party owes to the Government or another potential responsible party, the only question that remains is whether or not the phrase "to any other person" in the first sentence prevents the transfer of that liability to a non-potentially responsible party. Because the second sentence is read as a modifier

of the first sentence (or as stated by AM International "narrows the scope of the first sentence", supra) and because it cannot and does not modify the definition of liability given in Sec. 107(a), it must modify and does modify the language "any other person" in the first sentence. Read this way, the second sentence permits the transfer of liability owed by a potentially responsible party to a non-liable or non-potentially responsible party, such as an insurance company.

The latter interpretation gives Sec. 107(e)(1) a greater consistency for it relies more completely on the language of the statute itself and not at all on "appropriate" public policy or inconclusive legislative history. It is also consistent with the strict liability nature of the statute[15] and is congruent

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[15]CERCLA imposes a standard of strict liability. CERCLA Sec. 101(32), 42 U.S.C. Sec. 9601(32) states: "The

with the narrow defenses allowed in any CERCLA action.[16] This interpretation

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terms liable or liability under this Subsection shall be construed to be the standard of liability which obtains under section 1321 of Title 33 [the Clean Water Act]." Though not explicitly stated, Courts have concluded that a standard of strict liability prevails under the Clean Water Act. U.S. v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978).

[16]Sec. 107(b) defenses: "There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by--(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or then one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or (4) any combination of the foregoing paragraphs."

also lends a consistency to Sec. 107(e)(2)[17] and is in keeping with the tenor of the Act that more parties rather than less should be held accountable.

For the foregoing reasons, the Court concludes that the first sentence of Sec. 107(e) precludes the use of any indemnification, hold harmless or similar agreement to contractually transfer the liability that one potentially responsible party owes to the Government or another potentially responsible party.

It further concludes that the second sentence of Sec. 107(e) permits indemnification, hold harmless and similar agreements between a potentially responsible party and a party not otherwise liable under Sec. 107(a).[19]

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[17]See Footnote 8, supra.

[19]Nothing in the second sentence expressly defines the term "party". However, as the Court discussed supra, because the second sentence is a

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Minstar and AMF's motion to dismiss and motions for summary judgment are denied;

2. The parties rights are declared as stated;

3. Allocation of costs will be subsequently determined by the Court pursuant to Sec. 113 and other relevant standards in CERCLA.

Dated at Milwaukee, Wisconsin, this 5th day of November, 1993.

So ORDERED,

Rudolph T. Randa
Hon. Rudolph T. Randa,
U. S. District Judge

"qualifying" sentence, it can only mean that a non-potentially responsible party can insure or hold harmless a potentially responsible party liable to the Government or another potentially responsible party.